IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO. 95 OF 2006.

1. Vinodkumar s/o Shri Vishnuji Toshniwal,
   Adult., Occupation Business and
   Cultivator.

2. Vijaykumar s/o Shri Vishnuji Toshniwal,
   Adult, Occupation Cultivator and
   Business.

3. Shrikant s/o Shri Vishnuji Toshniwal,
   Adult, Occupation Cultivator and
   Business.

4. Radhabai wd/o Shri Vishnuji Toshniwal,
   65 years, Occupation Landlord.

5. Rajani w/o Sunil Sarda,
   Adult, Occupation Household work.

6. Jyoti w/o Shyam Kabra,
   42 years, Occupation Household work.

   All at present r/o Old Cloth Market,
   Akola, Taluka and District Akola. ... APPELLANTS

VERSUS

1. State of Maharashtra through
   the Collector, Akola.

2. The President, Maharashtra Housing
   and Area Development Board,
   Bombay.

3. The President, Nagpur Housing and

Area Development Board, Civil
Lines, Nagpur.

4. Chief Officer, Amravati Housing and
Area Development Board, Near Maltekdi
Road, Civil Lines, Amravati.

5. Executive Engineer, Maharashtra Housing
and Area Development Board, having its
office at Patrakar Colony, opposite LRT
College, Akola, District Akola. ... RESPONDENTS

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Shri Z.A. Haq, Advocate for the appellants.
Shri Pradeep D. Kothari, Assistant Government Pleader for the respondent No.1.
Shri P.P. Kothari, Advocate for the respondent Nos.2 to 5.

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CORAM : J.P. DEVADHAR AND
B.P. DHARMADHIKARI, J.
DATED : 22ND JUNE, 2007.

ORAL ORDER :

This appeal under Section 96 of the Code of Civil Procedure challenges the judgment and decree dated 26.08.2005 delivered by 5th Ad-hoc Additional District Judge, Akola in Special Civil Suit No. 296 of 1995. The said Civil Suit was filed by the present appellants for eviction of respondent Nos.2 to 5 and for possession of suit land i.e. Survey No.15 of Mouza Umarkhed, Tahsil and District Akola admeasuring 5 hectares and 18 R. There was also a prayer for

damages in said suit.

2. Lands having Survey No.5 admeasuring 6 hectares 77 R, Survey No.15 admeasuring 6 hectares 50 R and Survey No.16 admeasuring 4 hectares i.e. totaling to 17 hectares 27 R were sought to be acquired by the respondent Nos.2 to 5 i.e. authority functioning under Maharashtra Housing and Area Development Act, 1976 (for short MHADA, 1976) under Section 41 thereof. First notification in that respect was published on 13.12.1979 and on 27.07.1982, a notification calling upon Shri Vishnu, father of the appellant Nos.1 to 3, 5 and 6 and husband of the appellant No.4 was published and issued. Said notification and acquisition were challenged by Shrivishnuji by filing Writ Petition 1734 of 1982 before this Court and he got interim order protecting his possession in it. During pendency of this Writ Petition, matter was compromised between Shrivishnuji and the State of Maharashtra and others. Accordingly, Shrivishnuji filed pursis dated 10th July, 1990 before this Court and informed that he had offered 30 per cent of the land sought to be acquired free of compensation to State Government and Housing Board provided and remaining 70 per cent thereof was to be released by the State Government from acquisition. He informed the Court that by communication dated 10th July, 1990 proposal was accepted and there was a condition that he should withdraw writ petition

pending before this Court. This Court accepted the said pursis on 11th July, 1990 and disposed of Writ Petition as withdrawn. Shrivishnuji thereafter expired on 2nd August, 1991.

3. On 27.07.1992, Collector, Akola issued notice to the present appellant No.1 to handover the possession of 30 per cent of the land as compromised and accordingly in August, 1992, he delivered the possession thereof. In 1995, the appellant No.1 along with his brothers, sisters and mother filed Special Civil Suit No.296 of 1995 for release of land, as mentioned above. The basic contention therein was that the notification of acquisition under Section 41 was itself bad because no individual notices were served on all owners. It was contended that there was partition between Shrivishnuji and other co-parceners in 1969 and, therefore, the appellants/original plaintiffs were the owners in their own independent rights and hence notice of proposed acquisition ought to have been served upon them. It was further contended that as procedure preparatory to Section 41 notification was not followed, even on that count notification was bad. Lastly, it was contended that though 30 per cent of land was still in possession of the respondents, there was no transfer of title as no valid document recognised by the law was executed by any of the appellants in favour of the respondents. The respondents/original defendants filed their appropriate

written statements and the Court below thereafter framed issues at Exh.24. The issues framed by the Court and its answers thereof are as under.

Issues	**Findings**
1. Do the plaintiffs prove that notification under Section 41(i) of the Act is without jurisdiction and arbitrary ?	No As does not survive
2. Do they prove that act of defendant No.1 of taking possession is illegal ?	No.
3. Do they prove that possession of defendants is of trespasser ?	No.
4. Do they prove that defendants obtained proposal coercively ?	No.
5. Whether they are entitled for possession ?	No.
6. Do they prove that they are entitled for damages as claimed ?	No.
7. Whether they are entitled for Rs.10,72,93,000/- ?	No.
8. Whether this Court has jurisdiction ?	Yes.
9. Whether suit is within limitation ?	Yes.
10. Relief and Cost ?	As per final order.
Additional Issue	
11. Does the defendant prove that their the entire land had vested in them and	

hence the release of 70 P.C. Land is a good consideration for transfer of owner-ship in favour of the defendants regarding the suit land ?	No. As does not survive.

4. It is in this background that we have heard Shri Z.A. Haq, the learned Counsel appearing on behalf of the appellants, Shri P.D. Kothari, the learned Assistant Government Pleader appearing on behalf of the respondent No.1 and Shri P.P. Kothari, learned Counsel appearing on behalf of the respondent Nos.2 to 5.

5. After narrating the facts, as mentioned above, Advocate Haq has, by placing reliance upon the judgment of the Hon'ble Apex Court in the case of **Sarguja Transport Service .v. State Transport Appellate Tribunal, Gwalior and others (reported in AIR 1987 SC 88)**, contended that Writ Petition No. 1734 of 1982 was only withdrawn and, therefore, such withdrawal or act of filing writ petition could not operate as bar to the filing of Special Civil Suit. He contends that in view of the challenges made in Civil Suit even deceased Shrivishnuji could have maintained the independent Civil Suit challenging the entire action. He has thereafter contended that the learned trial Court itself has recorded a finding that notification issued under Section 41(1) was bad in law for non

compliance with various mandatory provisions and as such finding has not been challenged by any of the respondents, said finding has become final. He contends that apart from this, the learned Court below has not properly appreciated the fact that Section 41(1) requires individual notices to be served upon all recorded owners. He states that after 1969 partition, names of all appellants along with Shrivishnuji were mentioned in revenue record and, therefore, when notice for acquisition issued under Section 41(1), individual notice thereof to each owner was essential. As that has not been done, the acquisition must fail. He has placed reliance of the judgment of the Division Bench of this Court in the case of **Shyamrao Rajeshwarrao Potdukhe and others .v. State of Maharashtra and others (reported in 1993 Mh.L.J., 841)**. By placing reliance upon other judgment of the Division Bench in the case of **Vrajlal Jinabhai Patel .v. State of Maharashtra and others (reported in 2003(3) Mh.L.J., 215)**, he has stated that in such circumstances, title can be presumed to have been transferred only if there is compliance with the provisions of Section 41. He points out that there is no execution of any document as contemplated by provisions of Transfer of Property Act preferring the title of 30 per cent of amount surrendered by the appellants to the respondents. He further states that there is no award or order of acquisition published or pointed out by the respondents before the learned trial Court and hence in absence thereof, it is

apparent that the title has not passed on to the respondents. He, therefore, contends that as title is still with the present appellants, they are entitled to restoration of possession with the consequential relief as claimed for in the suit. He points out that the earlier order of acquiring land has ceased to be effected because of finding of the High Court that initiation of acquisition proceedings itself was barred as said finding has become bad. He also relies upon the judgment of Privy Council in the case of **Immudipattam Thirugnana Kondama Naik and another .v. Periya Dorasami and another (reported in Volume XXIV of the Indian Law Report (Madras Series) page 377)**. He states that observations of Privy Council at page No. 386 clearly foreclose the issues in so far as the present controversy is concerned.

6. Both Advocates respectively Shri Kothari appearing for the respondents state that the learned trial Court has expressly recorded a finding that the present appellants also willingly participated in negotiations and also willingly handed over the possession to the respondents after the notice therefor was issued on 27.07.1992. They contend that the appellant No.1 has in fact acted as a Power of Attorney for deceased Shrivishnuji during life time of Shrivishnuji and, therefore, the act of surrendering of 30 per cent and accepting remaining 70 per cent of land in return was an act on behalf of the entire family

and, therefore, is an act of all present appellants. They contend that in view of this position, the challenge to notification under Section 41(1) particularly about absence of individual notice must be deemed to have waived or in any case not available. They further state that though the Court below has recorded a finding that notification under Section 41(1) was bad, in these circumstances, that bar itself is not sufficient to hold that the acquisition itself has been rendered void. They point out that on 27th July, 1982, a notification was published in government gazette of even date whereby entire lands sought to be acquired were declared as vested in Government of Maharashtra under Section 41 sub Section (3) of MHADA, 1976. They contend that in view of subsequent conduct of Shrivishnuji in withdrawing writ petition and also subsequent conduct of the appellants in willingly handing over the possession, the said notification dated 27th July, 1982 still holds the field. They further argued that it is in these circumstances that when proposal for compromise was received from the family, the Government accepted the proposal and released 70 per cent of the land. They, therefore, state that the possession of remaining 30 per cent was rightly asked from the appellants and was rightly received by the respondents. According to them, therefore, challenge to said notification on any count as raised by Advocate Haq is misconceived and the Court below has rightly dealt with it. They further state that as the land already vested with the State

Government and the 70 per cent of land was returned by the government to the appellants in consideration of balance 30 per cent vesting with it without payment of any compensation, there was no question of any transfer deed or any other order passed by the State Government. According to them, therefore, there is no merit in the writ petition.

7. Advocate Shri P.P. Kothari further points out that the Housing Board has already constructed the tenements on the said land and those tenements have also been allotted to the tenants who are occupying them.

8. In reply, Advocate Haq points out the orders dated 21.10.1997 passed by this Court in Civil Application No. 1355/1997 in CRA No. 297/1997 which was filed by Housing Board and in Appeal against Order No. 24/1997 which was filed by the present appellants. He states that this Court at that time has expressly observed that the allottees of tenements should be informed by the Housing Board that the allotment in their favour would be subject to decision of the civil suit filed by the appellants. He, further points out that while disposing of Appeal against Order No. 24/1997 by judgment dated 13th January, 2003, again very same interim order has been relied upon and has been maintained. He, therefore, contends that mere fact that tenements have come up and allottees

have been placed in possession is not sufficient to deny relief to the present appellants.

9. In view of these facts, the question which falls for consideration is whether after the compromise was entered into by Shrivishnuji and possession of 30 per cent of the acquired land was handed over after his death by his legal heirs i.e. present appellant No.1, whether any such challenge at their instance to said acquisition can be entertained or not. It is to be noted that the matter was settled on 1st July, 1990 when petition was withdrawn and possession was handed over by the appellant No.1 on 27.07.1992. The suit, however, came to be filed some time in October, 1995, just after three years of the handing over of the possession.

10. In this background, it would be appropriate to notice certain findings which the learned trial Court has recorded in paragraph 18 of its judgment. After noticing documents at Exh.15, 16, 19 and 14, the learned trial Court has concluded that the plaintiff No.1 before it i.e. the appellant No.1 actively participated in compromise under reference or fresh contract under reference at the instance of late Shrivishnuji. The Court has further found that the appellant No.1 acted as Power of Attorney of Shrivishnuji while making

correspondence with the government in relation to its negotiation. The Court also noticed that after death of Shrivishnuji, the appellant No.1 took into confidence the other appellants and proceeded further with the matter. For that purpose, the reliance has been placed upon documents at Exhs.15, 52, 84 to 87. The Court in this background has, therefore, found that said appellant delivered possession of 30 per cent of land as agreed to by his late father and as per his choice. After said delivery of possession to the State Government, the appellant No.1 asked the present respondents about development activities to be undertaken on said 30 per cent of land and desired that those development activities should be so initiated and completed so as to benefit remaining 70 per cent of land released in favour of Shrivishnuji. The Court below, therefore, gathered that the appellant No.1 herein acted on behalf of all the members of family and nothing has been pointed out to us to hold that this appreciation of evidence by the learned trial Court is in any way perverse. When these findings were specifically put to Advocate Haq by us, he has only expressed that these observations overlooked absence of title in relation to 30 per cent land with the present respondents. The learned trial Court has further found that there was nothing on record to show that all the appellants were living separately from each other and it also gathered from evidence that all of them were living in joint family and they authorised the appellant No.1 and late Shrivishnuji to take

decision in the matter. It, therefore, concluded that the plaintiffs before it were also estopped from changing their stand and the principle of estopple prohibited them from doing this. As already observed above, there are no arguments advanced before us challenging these findings on facts reached by the Court below. The sequences of events and facts clearly demonstrate that the present appellants accepted release of 70 per cent land in their favour by the State Government and, therefore, they handed over possession of remaining 30 per cent to the present respondents. The learned Court below has found that the condition precedent like preparation of development plan etc. for the purposes of publishing notification under Section 41(1) of MHADA, 1976 were not complied with and as such said notification was not proper. However, then it has found that after settlement between the parties and in view of withdrawal of writ petition by Shrivishnuji, the said notification became irrelevant and, therefore, challenge to it was of no importance. As contended by the learned AGP, we find that when writ petition challenging said notification was filed before this Court and it was withdrawn as compromised, the notification cannot be treated as lapsed or as in any way rendered ineffective. The Court below has, while recording its finding against issue No.1, found that the appellants could not prove that the said notification was without jurisdiction or arbitrary as the issue did not survive. It, therefore cannot be said that the Court below has

recorded a finding against the present respondents on the issue. In any case, the provisions of Order 41 Rule 22 permit respondents to show to this Court that said consideration and application of mind by the learned trial Court is not proper and conclusion in this respect ought to have been in their favour. The notification by which Shrivishnuji was asked to deliver possession of all acquired lands from Survey Nos. 5, 15 and 16 forms subject matter of Writ Petition No. 1734 of 1982. On records of learned trial Court at Exh.37 is the notice dated 7th August, 1982 by which the persons in possession were called upon to handover possession to Collector, Akola within a period of 30 days. This notice issued by State Government refers to earlier notice under Section 41(3) of 1976 Act by which government declared the acquired property has vested in it free from all encumbrances on 27.07.1982. When challenge to this notification dated 27.07.1982 was withdrawn in writ petition, that too, on the ground that the matter is amicably settled between the appellants and the State Government, it is clear that the Court below was not right in observing that notification under Section 41(1) was in any way contrary to the provisions of law. The entire conduct of late Shrivishnuji and present appellants clearly show that they did not press any of their challenges to the acquisition and willingly accepted it in view of the settlement arrived at. Their further conduct of seeing that 30 per cent portion surrendered by them is also developed in a manner

beneficial to remaining 70 per cent which was released in their favour by the State Government clearly debars them from raising any such challenge.

11. Moment this finding is reached, it is clear that the order of vesting dated 27.07.1982 did not suffer in any way because of pendency of writ petition or its withdrawal and remained valid. The order dated 7th August, 1982 by which possession was asked has also remained valid. The government accepted the offer for settlement and agreed to release 70 per cent of land from acquisition if the late father accepted acquisition of 30 per cent of land. The said offer was made by deceased Shrivishnuji and was accepted by the government, it appears that the order for possession dated 7th August, 1982 remained stayed due to filing of Writ Petition No. 1734 of 1982 which was ultimately withdrawn on 01.07.1990 as compromised though this Court, at that time, did not record compromise. As such pursis filed by the petitioner in this respect was on record and orders have been passed in view of that pursis, it, therefore, becomes clear that the order of vesting only got modified only to the extent of 30 per cent of the land which was willingly subjected to acquisition by late Shrivishnuji and after his death by his legal heirs. In view of passing of this order of vesting, we find that it was not necessary for the appellants to execute any documents transferring title of said 30 per cent of land in favour of present respondents, it

was also not necessary for the respondents to call for any such documents. We, therefore, find that the arguments of Advocate Haq in this respect are totally misconceived.

12. It is also important to note that pursis at Exh.48 on record of Civil Suit makes reference to communication dated 2nd May, 1990 by which State Government accepted the proposal submitted by late Shrivishnuji. The perusal of said communication dated 2nd May, 1990 clearly shows that it is on the subject of release of lands of Shrivishnuji from land acquisition, and the government decided that out of total 44.03 acres, Shrivishnuji should give 13.01 acres land to Housing Board without any compensation and should withdraw all court cases with undertaking that he will not claim any damages in the matter. If this be complied with, balance 70 per cent land should be returned to Shrivishnuji. The order, therefore, clearly shows that the government has released 70 per cent of land from acquisition and, therefore, retained balance 30 per cent which had already vested in it.

13. This brings to the consideration by various cases cited by Advocate Shri Haq. In Sarguja Transport Service .v. State Transport Appellate Tribunal, Gwalior and others (cited supra), the Hon'ble Apex Court has held that

withdrawal of writ petition under Article 226 without permission to institute fresh petition in relation to very same cause may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India. Such withdrawal does not operate as res judicata. Here it is to be noted that it is not the case of plain and simple withdrawal, but it is the case of withdrawal on account of settlement reached between the parties and this Court has accordingly permitted to Shrivishnuji for withdrawal of Writ Petition No. 1734 of 1982. As the finding of learned trial Court that this action of Shrivishnuji was for and on behalf of all family members (present appellants) is accepted by us, it is clear that the present appellants could not have filed Civil Suit questioning said settlement in the year 1995 that too, three years after the settlement was accepted by them and possession was handed over to the government. It is to be noticed that in absence of said settlement, the entire land from Survey Nos. 5, 15 and 16 would have continued to vest in the State Government because of its earlier order dated 27th July, 1982.

14. Advocate Haq by relying on the judgment of the Division Bench of this Court in the case of Shyamrao Rajeshwarrao Potdukhe and others .v. State of Maharashtra and others (cited supra), submits that this ruling states that preliminary notice under Section 41(1) of MHADA, 1976 if issued without

fulfilling necessary conditions, the notice is bad. In paragraph 9, the Division Bench has also observed that issuance of notice to landholders in prescribed manner mentioning of names of such individuals is essential. It appears that in the facts of present case, there was no such individual notice but then all individuals have participated in the acquisition proceedings and subsequent compromise and as such in view of discussion above, in present judgment, we find that this ruling is of no assistance to the present appellants. In **Maharashtra Housing and Area Development Authority and Another .v. Gangaram and others (reported in 1994 (2) SCC, 489)** to which, Advocate Haq has fairly invited our attention, the Division Bench has stated that precondition for acquisition of land like existence of approved area development scheme before initiation of acquisition proceedings should be held to be mandatory in relation to notifications issued and published on and from January 12, 1994. This judgment of Hon'ble Apex Court is dated 11th January, 1990. The notice and notification in present matter are issued much prior to 1994 and hence we find that even objection on this account sought to be raised by the learned Advocate Shri Haq cannot be entertained.

15. In Vrajlal Jinabhai Patel .v. State of Maharashtra and others (cited supra), the Division Bench has considered the question whether mere passing of

layout plan by sanctioning authority has the effect of vesting open space in planning authority. The question before us is entirely different. The proceedings for land acquisition were completed in 1982 before filing of Writ Petition and thereafter a compromise was reached between the parties. We, therefore, find that this Division Bench ruling is of no help to the present appellants.

16. Lastly, judgment of Privy Council in the case of Immudipattam Thirugnana Kondama Naik and another .v. Periya Dorasami and another (cited supra) has been pointed out to state that mere intention to transfer property is not sufficient in the eyes of law to confer title upon transferee. There can be no dispute about this proposition but in the facts of the present case, it is to be noted that land had already vested in Housing Board in July, 1982 itself and later on as a part of compromise the government released 70 per cent of such land from acquisition in consideration of Shrivishnuji/present appellants not claiming any compensation for remaining 30 per cent which was already vested in it. In other words, Shrivishnuji and present appellants got compensation in kind for land acquired by the State Government.

17. In these circumstances, we find nothing wrong in the findings reached

by the learned lower Court. No case is made out for taking different view of the matter. Appeal is accordingly dismissed. However, in the circumstances and the facts, there shall be no order as to costs.

JUDGE

JUDGE

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